1908

February 18.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

GOBIND DAS AND OTHERS (PLAINTIFFS) *v.* SARJU DAS (DEFENDANT). *

Act No. IX of 1872 *(Indian Contract Act), section* 25—*Act No. XV of* 1877 *(Indian Limitation Act), section* 19—*Acknowledgment—Promise to pay a time-barred debt.*

Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowledgment of the debt. *Maniram Seth* v. *Seth Rupchand* (1) distinguished.

THE facts of this case are as follows:—

The plaintiffs came into Court on the allegation that the defendant, on the 2nd November 1899, executed a document, described as a *sarkhat*, in favour of the plaintiffs' firm in respect of an old debt of Rs. 995-10-0 due by him to the firm, and that in this document he promised to pay the aforesaid sum without interest.

They further alleged that again on the 24th of October 1902, a similar document was executed by the defendant promising to pay the aforesaid debt without interest. The plaintiff sued to recover the amount due under this document. The defendant pleaded that the document sued on was a mere acknowledgment and was not a promise to pay a time-barred debt, and that the suit was not maintainable on the mere acknowledgment.

The Court of first instance (Subordinate Judge of Benares) came to the conclusion, on a consideration of the language of the document which is the basis of the suit, that it was not a mere acknowledgment of a debt, but that it contained a promise to pay the debt without interest and accordingly decreed the plaintiffs' claim. On appeal, the District Judge held that, there being no clearly expressed promise in the *sarkhat*, the plaintiffs were not entitled to succeed, and dismissed the suit. The plaintiffs appealed to the High Court.

Pandit *Tej Bahadur Sapru* and Babu *Lalit Mohan Banerji*, for the appellant.

* Second Appeal No. 1260 of 1905 from a decree of G. A. Paterson, District Judge of Benares, dated the 21st of August 1906, reversing a decree of Aziz-ur-Rahman, Subordinate Judge of Benares, dated the 21st of May 1906.

(1) (1906) I. L. R., 33 Calc., 1047.

1908

GOBIND DAS v. SARJU DAS.

Babu *Durga Charan Banerji*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—The plaintiffs, who are appellants here, come into Court on the allegation that the defendant respondent, on the 2nd November 1899, executed a document, described as a *sarkhat*, in favour of the plaintiffs' firm in respect of an old debt of Rs. 995-10-0 due by him to the firm, and that in this document he promised to pay the aforesaid sum without interest.

The plaint sets forth that again on the 24th of October 1902, a similar document was executed by the defendant promising to pay the aforesaid debt without interest. The plaintiff sued to recover the amount due under this document. The defendant pleaded that the document sued on was a mere acknowledgment and was not a promise to pay a time-barred debt, and that the suit was not maintainable on the mere acknowledgment.

The Court of first instance came to the conclusion, on a consideration of the language of the document which is the basis of the suit, that it was not a mere acknowledgment of a debt, but that it contained a promise to pay the debt without interest. On appeal, the learned District Judge held that, there being no clearly expressed promise in the *sarkhat*, the plaintiffs were not entitled to succeed, and dismissed the suit. The plaintiffs come here in second appeal.

The first plea is that the *sarkhat* in question contains an express promise to pay the debt. We have carefully considered the language of the document, and we cannot find in it any promise to pay. The document no doubt states that up to a certain date so much is due without interest, and it refers to the deposit of the title deeds of a house in lieu of the debt (*badlemen*).

The next plea in the memorandum of appeal is that so long as the intention to pay a time-barred debt is clearly deducible from the language of a document, the creditor can maintain a suit, and it is not necessary that it should contain an express promise to pay. We cannot accept this plea. It is probable that when the defendant executed the document he fully intended to pay the debt due from him, but a suit cannot be based upon an unexpressed intention.

1908

GOBIND DAS v. SARJU DAS.

The learned advocate for the appellants relied strongly upon an expression in the judgment of their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (1) where their Lordships say:—"An unconditional acknowledgment has always been held to imply a promise to pay because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

If we were to give to this passage the wide meaning contended for and hold that whenever there is a clear acknowledgment of a debt, whether time-barred or not, that is equivalent to a promise upon which a suit may be maintained, the result would be that the effect of the opening words of section 19 would be nullified. That section renders it necessary that the acknowledgment referred to therein must be made before the expiration of the period prescribed for the suit. It is evident that in the case cited their Lordships had no intention of in any way departing from the clear meaning of the language of section 19. In the case before them, the acknowledgment was made before the statutory period had run out and their Lordships say:—"Thus one requisite of section 19 is complied with." Under section 25, sub-section 3 of the Indian Contract Act, a promise made in writing and signed by the person to be charged therewith to pay a barred debt is a good consideration, but there must be a distinct promise and not a mere acknowledgment.

In our opinion, the decision of the Court below is right. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1906) I. L. R., 33 Calc., 1047, at p. 1058.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

1908
March 5.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* BASHARAT-ULLAH AND ANOTHER (PLAINTIFFS).*

Act No. II of 1899 *(Indian Stamp Act), sections* 40, 44, 48 *and* 56 *et seqq—Stamp—Improperly stamped document tendered in evidence—Stamp duty from whom recoverable.*

If a plaintiff produces in Court in support of his claim an unstamped or improperly stamped document, he primarily is the person from whom the requisite stamp duty and penalty may be recovered under section 40 of the Indian Stamp Act, 1899.

THE facts of this case are as follows:—

The plaintiffs produced before the Munsif of Muttra two documents; one was a conveyance, and the other a receipt. They wished the two documents admitted in evidence in support of their claim. Both the documents were documents executed in favour of the predecessor in title of the plaintiffs. The Munsif, being of opinion that the documents were not properly stamped, impounded them and sent them in original to the Collector, under the provisions of section 38, clause (2) of Act No. II of 1899. The Collector, acting under section 40, clause (1) (*b*), of the same Act, required from the plaintiffs payment of the proper duty together with a penalty. The plaintiffs did not pay the penalty, and the Collector put in force the provisions of section 48 of the same Act, and attached certain property of the plaintiffs. Thereupon the plaintiffs brought the suit out of which this second appeal has arisen against the Secretary of State for India in Council asking for the release of the attached property and for damages. The Court of first instance (Munsif of Muttra) ordered the release of the attached property and the decree of that Court was confirmed in appeal by the Judge of the Court of Small Causes, Agra, exercising powers of a Subordinate Judge. Both the Courts concurred in holding that the duty and penalty were not recoverable from the plaintiffs, but from the other parties to the deeds in question. The defendant appealed to the High Court contending that the Courts below had erred in holding that the plaintiffs were not liable to pay the stamp duty and penalty required of them.

* Second Appeal No. 590 of 1906 from a decree of Muhammad Siraj-ud-din, Judge of the Court of Small Causes, Agra, exercising powers of a Subordinate Judge, dated the 4th of May, 1906, confirming a decree of Maharaj Singh Mathur, Munsif of Muttra, dated the 31st of August 1905.

1908

SECRETARY OF STATE FOR INDIA IN COUNCIL v. BASHARAT-ULLAH.

Mr. *A. E. Ryves* for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

KNOX and AIKMAN, JJ.—The plaintiffs, who are respondents to this second appeal, produced before the Munsif of Muttra two documents; one was a conveyance, and the other a receipt. They wished the two documents admitted in evidence in support of their claim. Both the documents were documents executed in favour of the predecessor in title of the plaintiffs. The Munsif, being of opinion that the documents were not properly stamped, impounded them and sent them in original to the Collector, under the provisions of section 38, clause (2) of Act No. II of 1899. The Collector, acting under section 40, clause (1) (*b*), of the same Act, required from the plaintiffs payment of the proper duty together with a penalty. The plaintiffs did not pay the penalty, and the Collector put in force the provisions of section 48 of the same Act, and attached certain property of the plaintiffs. Thereupon the plaintiffs brought the suit out of which this second appeal has arisen for the release of the attached property and damages. The Court of first instance ordered the release of the attached property and the decree of that Court was confirmed in appeal. Both the Courts concurred in holding that the duty and penalty were not recoverable from the plaintiffs, but from the other parties to the deeds in question. The defendant, namely the Secretary of State for India in Council, comes here in second appeal, and it is contended on his behalf that the Courts below have erred in holding that the plaintiffs were not liable to pay the stamp duty and penalty required of them.

In our opinion, this appeal must prevail. Section 40, clause (1) (*b*), is silent as to the person from whom the payment of the proper duty and penalty is to be required. If the Collector required it from the wrong person, his procedure was open to review, as provided by Chapter VI of this Act. No step was taken to review the Collector's order. Therefore the Collector was acting within the authority given him by section 48 in ordering the attachment. Further, we are of opinion that as it was the plaintiffs who wished the documents admitted in evidence in support of their claim, they are the persons from whom the Collector, in the first instance, can recover the duty and penalty

1908

SECRETARY OF STATE FOR INDIA IN COUNCIL v. BASHARAT-ULLAH.

required before the documents can be admitted in evidence. The provisions of section 44 are important as showing that when any duty or penalty has been recovered from any person in respect of an instrument, and some other person was bound to bear the expense of providing the proper stamp, the person from whom the duty and penalty has been recovered shall be entitled to recover from such other person the amount of the duty and penalty so recovered. We decree the appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

1908

March 10.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

AMIR BEGAM (PLAINTIFF) *v.* THE BANK OF UPPER INDIA, LIMITED (DEFENDANT).*

Civil Procedure Code, sections 306, 293—*Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by decree-holder for difference of price on resale.*

Certain immovable property was put up to auction in execution of a decree and purchased by A. B, but the purchaser did not at once make the deposit required by section 306 of the Code of Civil Procedure, and the property was subsequently—but not "forthwith"—put up again to auction and sold for a considerably less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all, and that the decree-holder was not entitled to claim against the first purchaser under section 293 of the Code, compensation for the loss resulting on the second sale. *Intizam Ali Khan* v. *Narain Singh* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are these. The Bank of Upper India held a decree for sale of the property of Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan. In execution of that decree they attached and advertised for sale the property of their judgment-debtors. The plaintiff, Musammat Amir Begam, who is the wife of Afzal Shah, authorized one Haidar Shah to purchase for her out of the property

* First Appeal No. 29 of 1906 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 30th November 1905.

(1) (1883) I. L. R., 5 All., 316.

1908

AMIR BEGAM v. THE BANK OF UPPER INDIA, LIMITED.

so advertised for sale, as she alleges, the share which belonged to her husband, but not the shares of Dost Muhammad Khan and Amir Muhammad Khan, in the village of Purwana Mahmudpur. The share of Afzal Shah in this village was sold on the 20th of August 1903 to the plaintiff, and the deposit in respect of the purchase money was duly made and this sale was carried out. With this share we have nothing to do in this appeal. The shares of the other judgment-debtors in this village were put up for sale on the 23rd of August 1903 and were knocked down for a sum of Rs. 20,000. Haidar Shah attended at this sale and was the highest bidder. He represented that he attended and bid at the sale on behalf of the plaintiff. No deposit on account of the purchase money was made. Time was allowed to Haidar Shah to pay the deposit, but he failed to do so, and on the 25th of August 1903, this share of the property was sold for a sum of Rs. 12,500 to the decree-holders, the Bank of Upper India. The Bank then claimed to be entitled to recover from Musammat Amir Begam the amount of the difference in the sale price of the property and the price offered by Haidar Shah, namely, Rs. 7,500. Musammat Amir Begam objected, alleging that Haidar Shah had no authority from her to purchase the property in her name. The Bank then attached her property in execution for the purpose of raising the amount of their claim, and she thereupon instituted the present suit to have it declared that she was not liable to pay the deficiency, and that the defendant Bank was not entitled to recover that deficiency from her, and that her property could not be sold to satisfy the amount.

The Court below held upon the issue as to whether or not Musammat Amir Begam did give authority to Haidar Shah to bid on her behalf in respect of this share of the property, that she had given such authority and dismissed her suit. Hence the appeal which is now before us.

Evidence has been given by Haidar Shah, also by Musammat Amir Begam herself and by two other persons in support of her case. Musammat Amir Begam positively denies that she authorized Haidar Shah to purchase any shares in the property other than the shares which belonged to her husband. Haidar Shah corroborates her as to this. In his evidence he stated that Amir

Begam did not authorize him to make any bid for the property of Dost Muhammad Khan and Amir Muhammad Khan and he says :—" I advanced bids at the request of Ghafur Bakhsh and Burkat Ali Khan." Ghafur Bakhsh is a vakil who is employed by the Bank. Barkat Ali Khan is also an agent of the Bank. He further deposed :—" I caused the name of Amir Begam to be taken down, thinking that she might possibly take the property. Permission had not been given to me. Amir Begam has not executed any general power of attorney in my favour nor has she given me any written authority." Two other witnesses, Ahmad Mir Khan and Prasadi Lal, support the evidence of Haidar Shah and Musammat Amir Begam. No evidence to rebut the case of the plaintiff has been adduced. As Mr. *O'Conor* pointed out, there could not very well be any evidence procurable, seeing that there was no written authority given by the plaintiff to Haidar Shah. He did not act under any power of attorney, and, so far as the evidence goes, save and except that he was asked by Musammat Amir Begam to purchase some of her husband's property on her behalf, there is no evidence before the Court other than that to which we have referred. On this evidence, if we consider it trustworthy, the plaintiff was entitled to a decree.

The learned Subordinate Judge has, however, rejected it, and upon the following grounds. On the 2nd of September 1903 Musammat Amir Begam, together with Haidar Shah, who was entitled to certain shares in the property of Sardar Bahadur, Mir Khan and her husband Afzal Khan, executed a mortgage in favour of one Badri Prasad to secure a sum of Rs. 9,250. This money was borrowed for the purpose of satisfying the purchase money of property which had been purchased at the sale in question by Haidar Shah on behalf of Musammat Amir Begam. In addition to the shares of Afzal Shah in the village of Purwana Mahmudpur, Haidar Shah purchased for Musammat Amir Begam several bits of land of small value, one in Nayagaon and another in Kajraut. No authority apparently was given by Musammat Amir Begam for the purchase of these small properties, but she appears to have acquiesced in the act of Haidar Shah in making the purchases and paid the amount of the deposit and also the balance of the purchase money. The learned

1908

AMIR BEGAM v. THE BANK OF UPPER INDIA, LIMITED.

Subordinate Judge was of opinion upon a perusal of this document that Musammat Amir Begam must be taken to have authorized Haidar Shah to purchase other properties than those which are referred to in this document. He says, referring to this deed:—"She admitted that she had borrowed money from Badri Das to deposit the sale price. She admitted that Haidar Shah purchased for her Afzal Shah's share in Purwana and also *hakiats* in Kajraut and also in the town of Kila and in other villages," and he also says that "the properties so purchased, including *bist biswa* mauza Purwana Mahmudpur, were mortgaged by Amir Begam herself in this deed." We have carefully read the deed, and it appears to us that the learned Subordinate Judge has to some extent misunderstood its terms. The first recital in the deed runs as follows:—"We have borrowed from Seth Badri Das, son of Seth Lala Har Nath Rai, * * * Rs. 9,250 in cash, etc., for payment of the purchase money of the property in mauza Purwana Mahmudpur, etc., being the property of Agha Syed Afzal Shah aforesaid and Agha Syed Dost Muhammad Khan and Amir Muhammad Khan, relations, which was sold by auction from the 20th to the 22nd of August 1903 by the Revenue Court at Bulandshahr in satisfaction of the amount of the decrees held by the Bank of Upper India, Limited, Meerut, and which I, Musammat Amir Begam, have purchased through my relations Agha Syed Haidar Shah and others." Then in the operative part the mortgagors purport to hypothecate amongst other properties the entire village of Purwana Mahmudpur, that is 48 *sihams* out of 192 *sihams*. The learned Subordinate Judge treated the recital that the money which was borrowed was borrowed for the purpose of paying the purchase money of the property in Purwana Mahmudpur, which belonged to Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan, as conclusively showing that Musammat Amir Begam had knowledge of and acquiesced in and ratified the purchase by Haidar Shah of the shares in that village which belonged to Dost Muhammad Khan and Amir Muhammad Khan. It appears to us that this inference cannot be drawn from the document. The money which was borrowed was required for the purchase of not merely the property situate in Purwana Mahmudpur belonging

to Afzal Shah, but also other property belonging not merely to him but also to Dost Muhammad Khan and Amir Muhammad Khan, namely, the property in the village of Nayagaon and in the village of Kajraut, and the statement appearing later on in the document that Musammat Amir Begam had purchased the property, which was so intended to be hypothecated, through Haidar Shah and others, shows that the property hypothecated was that which she had authorized Haidar Shah to purchase. This appears to be indisputable from the fact that at the date of the mortgage, namely, the 2nd of September 1903, the shares which belonged to Dost Muhammad Khan and Amir Muhammad Khan had been put up for sale and sold to the Bank, namely, on the 25th of August 1903. It is impossible to believe that the mortgagors in this mortgage purported to hypothecate property in which they had no interest whatsoever, even if the mortgagee was careless enough to accept the security of property in which his mortgagors had no interest. The language in which the document is couched appears to us to have misled the Court below. It is only on a careful perusal of it that it is apparent that the advance was obtained from the mortgagor to enable Musammat Amir Begam to complete the purchase of her husband's property in Purwana Mahmudpur and the small portions of property in other villages which Haidar Shah had without authority purchased for her. There are other matters which seem to confirm the view which we have formed, and these are that the plaintiff only procured and sent for deposit in Court a sum of Rs. 3,600, that is, the 25 per cent. deposit required by the rules in respect of the purchase of the property of her husband, and further that the amount obtained by her on the security of the 2nd of September 1903 was only a sum of Rs. 9,250, which would have been entirely inadequate to satisfy the purchase, which Haidar Shah purported to make on her behalf. Upon the whole we are clearly of opinion that Haidar Shah had no authority whatsoever from Musammat Amir Begam to purchase the shares of Dost Muhammad Khan and Amir Muhammad Khan, and this being so, the plaintiff's suit ought to have been decreed.

There is a further matter which has occurred to us on the hearing of the appeal, and that is this. Under the provisions of

1908

AMIR BEGAM v. THE BANK OF UPPER INDIA, LIMITED.

section 306 of the Code of Civil Procedure, a purchaser is required to deposit 25 per cent. of the amount of his purchase money immediately after he has been declared the purchaser. The section provides that in default of such deposit the property shall be forthwith put up again and sold. It was decided by a Bench of this Court in the case of *Intizam Ali* v. *Narain Singh* (1) that if a purchaser failed to make the deposit required by this section, no sale whatever could be held to have taken place. Stuart, C.J., in that case held that the sale impugned by the appeal was not bad by reason of an irregularity in its conduct, but that "it was no sale at all, inasmuch as the indispensable conditions of the law, as contained in section 306 of the Code of Civil Procedure, were not fulfilled by the person declared to be the purchaser. The sale took place early in the afternoon of 20th April 1882, and the respondent did not pay a deposit of 25 per cent. on the amount of his purchase immediately after the declaration that he was the purchaser." Then they say :—"In default of such deposit the property should have been forthwith put up again and sold. The order of the Court below confirming the sale was therefore wrong and must be set aside." This is an authority which we are bound to follow. It decides that there was in this case no sale, and therefore no resale such as would justify the claim of the bank made under section 293. There was in fact no resale within the meaning of that section. Therefore upon the merits as well as in view of the provisions of section 306, it appears to us that the plaintiff ought to have succeeded in her suit.

We therefore allow the appeal. We set aside the decree of the Court below and give a decree to the plaintiff in the terms of the relief asked for in the plaint. The defendant Bank must pay the costs of this appeal and also the costs in the Court below.

Appeal decreed.

(1) (1883) I. L. R., 5 All., 316.

1908
March 10.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

NIAZ AHMAD (PLAINTIFF) *v.* ABDUL HAMID (DEFENDANT).*

Civil Procedure Code, sections 43, 373—*Act No XV of* 1877 *(Indian Limitation Act), schedule II, article* 106—*Suit for division of alleged partnership assets—Separate suits for property at different places.*

The plaintiff sued for possession of one-half of certain property in the Moradabad district, alleging that it had been purchased out of the profits of a partnership subsisting between himself and the defendant. Other similar property in Naini Tal was mentioned in the plaint, but the plaintiff said he would bring a separate suit in respect of that property. The first suit was withdrawn, but without permission being granted to bring a fresh suit. Subsequently a second suit was brought in Naini Tal respecting the property there. The plaintiff alleged himself to be in possession of this property, but it was found that he was not. *Held* that the second suit was barred by the operation of section 43 as well as of section 373 of the Code of Civil Procedure, as also, on the finding that the partnership had been dissolved more than three years before suit, by article 106 of the second schedule to the Limitation Act.

THE plaintiff in this case filed a suit in the Moradabad district for the recovery of certain property. He alleged that the property had been acquired by the defendant out of partnership funds, and that it had been dishonestly entered by the defendant in his own name. The plaintiff prayed for a declaration that the property in question was partnership property, and further asked to be put into possession of one half of it. In his plaint the plaintiff mentioned that there was other similar property in Naini Tal, and said that, as he could not legally sue for it in the Moradabad court, he would bring a separate suit for it. The suit filed in Moradabad terminated by being withdrawn without permission under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff then brought a second suit in the court of the Deputy Commissioner of Naini Tal in respect of the property alluded to in his former plaint. Of this property he alleged himself to be in possession and asked for a partition. The Court of first instance found that the plaintiff was not in possession, and dismissed the suit as being barred by the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act, and this decree was affirmed in appeal by the Commissioner. On the plaintiff's application certain questions, which are stated in the opinion of the Court,

* Miscellaneous No. 196 of 1907.

1908

NIAZ AHMAD v. ABDUL HAMID.

were referred by Government to the High Court under rule 17 of the Kumaun Rules of 1894.

Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru*, for the applicant.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal* for the opposite party.

AIKMAN and KARAMAT HUSEIN, JJ.—This is a reference by Government under rule 17 of the Kumaun Rules, 1894, asking for the report and opinion of this Court on certain questions arising out of an appellate decree of the Commissioner of Kumaun. The case is a difficult one. After hearing it thoroughly and ably argued by the counsel on both sides, we reply as follows:—

In the suit filed in Moradabad, the plaintiff came into Court alleging a partnership between himself and the defendant. He asserted that certain property had been acquired by the defendant out of the partnership funds, and that it had been dishonestly entered by the defendant in his own name. He asked for a declaration that the property in question was partnership property, and further asked to be put in possession of one-half of it. In that plaint he referred to the existence of other property in Naini Tal and said that as he could not legally sue for it in the Moradabad Court, he would bring a separate suit for it. The Moradabad suit was afterwards withdrawn by the plaintiff, no permission being given under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff afterwards filed in the Court of the Deputy Commissioner of Naini Tal the suit which has given rise to this reference. The suit is in regard to property which, according to the statements in paragraph 1 of the plaint and the evidence of the plaintiff, was partnership property as defined in section 253 of the Contract Act. The plaintiff stated that he was in possession of this property and asked for a partition. In his plaint and in his evidence, the plaintiff alleged that he was in possession of the property in suit. The defendant denied that plaintiff was in possession. The Deputy Commissioner found that plaintiff was not in possession, and this finding was not challenged by the plaintiff in his appeal to the Commissioner. The Courts

below held that the suit was barred under the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act.

The first question asked by the Government is—"whether, having regard to the statements in the plaints of the suits filed in Moradabad and Naini Tal, separate causes of action was disclosed, or whether the cause of action in both suits was one and the same?" We have carefully studied the plaints, and in our opinion the cause of action in both suits was in reality one and the same, *viz.*, a claim to property arising out of the relation of the parties as partners in the firm at Naini Tal.

The second question is—"whether, if there was only a single cause of action in both suits, the plaintiff was bound to include the claim for the Naini Tal property in the suit filed in Moradabad, and whether his omission to do so precludes the institution of the present suit?" In our opinion, the plaintiff not only might but ought to have included his present claim in the first suit, and his omission to do so precludes the institution of the present suit.

The third question is—"did the reference to arbitration in the Moradabad suit bar the trial of that suit? If it did, is the present suit affected or not by the provisions of section 43 of the Code of Civil Procedure?" This question appears to be based on some misconception. The parties are agreed that no reference to arbitration was made in the Moradabad suit.

The fourth question is—"does the withdrawal of the Moradabad suit without permission to bring a fresh suit, under section 373, Civil Procedure Code, bar the present suit for the portion of the claim omitted in the previous suit?" Having regard to our answer to the second question, we answer this in the affirmative.

The fifth question is—"is the present suit barred under article 106 of the second Schedule of the Limitation Act (XV of 1877)?" Although the suit is not in terms a suit for a share of profits of a dissolved partnership, it is found by the Courts below that the partnership was dissolved upwards of three years before the suit was instituted in Naini Tal, and as the plaintiff would not have been entitled to the relief he asked for without

1908

NIAZ AHMAD v. ABDUL HAMID,

an account and a finding as to his share of the profits of the partnership, we hold that his present suit is barred.

This is our reply to the reference. In our opinion the respondent is entitled to his costs in all courts.

1908
March 13.

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Aikman. *

SADDU (DEFENDANT) *v.* BIHARI SINGH (PLAINTIFF).

Land-holder and tenant—Partition—Rights of tenants in respect of house sites in the abadi.

As the result of the partition of a village hitherto forming one mahal into two mahals the occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house which the tenant and his predecessors in title had occupied for a considerable period as appurtenant to the agricultural holding fell into the other mahal owned by the other co-sharer. *Held* that the partition effected no change in the position of the tenant: so long as he continued in possession of his occupancy holding he could not be ejected from his house in the abadi of the village, nor could he be required to pay rent therefor. *Dharam Singh* v. *Bhoolar* (1) followed. *Sundar Lal* v. *Chajju* (2) distinguished. *Panna* v. *Nazir Husain* (3) doubted.

THIS was a suit brought by one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house was situated in a portion of the abadi of the village which had fallen into the share of the plaintiff by partition. The defendant cultivated land in another mahal of the same village, under a different proprietor. The plaintiff sought to eject him from his house on the ground that he refused to pay ground rent for the site of the house. The Court of first instance (Munsif of Moradabad) dismissed the suit, but the lower appellate Court (District Judge) reversed this decree and decreed the plaintiff's claim. The defendant appealed to the High Court. Issues were referred to the lower appellate

* Second Appeal No. 961 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 20th of July 1905, reversing a decree of Mohan Lal, Munsif of Moradabad, dated the 2nd of March 1905.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 142.
(3) Weekly Notes, 1902, p. 60.